CURRENT LEGISLATION

CROSS-EXAMINATION AND IMPEACHMENT OF ADVERSARY CALLED AS WITNESS.—A recent statute in Wyoming, Laws 1921, c. 116, § 1, has repealed Wyo. Comp. Stat. (1920) c. 363, § 5808, which provided that a party might compel an adverse party to testify either orally or by deposition as any other witness may be compelled. The new statute enlarges upon the former one by first providing generally for the competency of witnesses. It further provides that one who is a party of record in any civil proceeding, or for whose immediate benefit such action or proceeding is prosecuted or defended, or any officer of any municipal or private corporation which is a party of record, or any employe or agent of a corporation so situated, may be called as a witness by the adverse party and compelled to testify as if under cross-examination. Nor is the party calling such adverse party or witness concluded by his testimony, but may rebut the evidence by counter or impeaching testimony. A wide departure from the common law rules regarding the competency of witnesses and of evidence, is shown by this statute. Upon the former point it is not unique as a statute, and even on the latter point it does not stand entirely alone, as will be noted more fully later.

This statute represents a step forward in the long-drawn out struggle against the rules of the common law. Those rules were based upon policies which no longer seem to have the same relative importance. The progress of this struggle has been gradual and far from uniform in all states.

At common law a party to an action was incompetent to testify.[1] Self-interest was thought to be too likely to expose one to the temptation to commit perjury.[2] And so a party was precluded from testifying although his only pecuniary interest in the litigation was in regard to the liability for costs.[3] It was strongly intimated by Mr. Justice Nelson in *Bridges* v. *Armour*[4] that a party of record should not be allowed to testify even if completely divested of pecuniary interest. Furthermore, one could not compel his adversary to testify.[5] These rules were firmly adhered to in actions at law. Certainty, especially in the rules of evidence, was held to be of prime importance.[6] The few exceptions allowed by the common law to the general rule that a party could not testify, grew out of absolute necessity.[7] Finally, however, the inconveniences of the rule led to its being abolished everywhere by statutes. Now in every state a party to a civil suit or proceeding is a competent witness.[8]

Another common law rule was that a party calling a witness could not impeach him. The rule applies only to prevent the party calling a witness from (1) calling another witness to impeach the general character of the witness, (2) proving prior inconsistent or contradictory statements of the witness, (3) a contradiction by another witness where the only effect would be to impeach the witness, and not to give any material evidence upon an issue in the case.[9] So where in a criminal

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[1] *Stein* v. *Bowman* (1839) 38 U. S. 209. [2] *Ibid.* 219.
[3] *Bridges* v. *Armour* (1847) 46 U. S. 91.
[4] See *ibid.* 94.
[5] *The King* v. *Woburn* (1808) 10 East 395; *Mauran* v. *Lamb* (N. Y. 1827) 7 Cow. 174; *Storrs* v. *Wetmore* (Conn. 1787) Kirby 203.
[6] *Mauran* v. *Lamb, supra,* footnote 5.
[7] See 4 Jones, *Evidence* (Horw. ed. 1914) § 728.
[8] See *ibid.* § 730n. Arkansas has such a provision in its constitution. Ark. Const. (1874) Sc. § 2.
[9] See *Becker* v. *Koch* (1887) 104 N. Y. 394, 401, 10 N. E. 701.

case the prosecution examined a witness for the defence on other subjects than those testified to by him on direct examination, on such subjects the prosecution made the witness its own. Hence, for the purpose of impeachment, it could not prove prior inconsistent statements made by the witness on those points.[10] In civil cases the rule has been followed that prior inconsistent statements of one's own witness could not be proved.[11] However, where the party calling a witness was surprised at his turning adverse, the law relaxed to the extent of allowing him to refresh the memory of the witness by cross-examination and leading questions.[12] But now some state statutes have gone so far as to allow one to prove prior inconsistent statements in such a case for the specific purpose of impeachment.[13] The reason for the common law rule against impeachment was that a party calling a witness vouches to a certain extent for his character and veracity. Therefore if disappointed in, or even surprised at his testimony, the party should not then be allowed to prove him unworthy of belief.[14] However, a party might introduce evidence of any competent and material fact denied by his own witness, although the evidence might have the incidental effect of discrediting that witness.[15]

But often the testimony of an adverse party or witness may be material to the presentation of a cause. Furthermore, there may be good reason to suppose that that testimony will in reality prove favorable. At the same time it may be feared that the adverse party will not testify favorably, and if the witness does testify adversely, under the common law rule he could not be impeached. In a case of this kind the party calling the witness would find himself in a very embarrassing position. There, inability to impeach would go so far as to prevent the effectual administration of justice. Thus it came about that many states passed statutes allowing one to show, after a proper foundation was laid, that a witness had previously made statements inconsistent with his present testimony.[16]

Of course, prior inconsistent statements of a party of record relative to any material fact or issue are admissible without the aid of any statute, as admissions against interest. As such they have true probative value and need no foundation.[17]

Evidently, however, it has been felt that by itself this rule of the common law regarding admissions is inadequate. Therefore we find several state laws similar to this Wyoming statute which is under discussion.[18] These not only permit one in terms to call the adverse party and prove prior inconsistent statements, but also

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[10] See *People* v. *Burgess* (1897) 153 N. Y. 561, 574, 47 N. E. 889.

[11] *Westphal* v. *St. Joseph, etc. St. Ry. Co.* (1903) 134 Mich. 239, 96 N. W. 19; *Collins* v. *Hoehle* (1898) 99 Wis. 639, 75 N. W. 416; *Berkowsky* v. *N. Y. City R. R. Co.* (1908) 127 App. Div. 544, 111 N. Y. Supp. 989.

[12] See *Berkowsky* v. *N. Y. City R. R. Co., supra,* footnote 11.

[13] Ga. Ann. Code (6 Park 1914) art. 22, § 1050; Fla. Comp. Laws Ann. (1914) tit. 1, c. 15, § 1510; N. Mex. Stat. Ann. (1915) § 2180.

[14] *Sisson* v. *Conger* (N. Y. 1873) 1 Thomp. & C. 564, 567; see 2 Phillips, *Evidence* (3d ed. 1849) 448.

[15] See *Adams* v. *Wheeler* (1867) 97 Mass. 67.

[16] Mass. Rev. Laws (1902) c. 175, § 24; Ore. Laws (Olson 1920) § 861; Ark. Dig. of Stat. (1916) § 3449; Cal. Code Civ. Proc. (Deering 1909) § 2049; Idaho Comp. Stat. (1919) § 8036. Kentucky and Indiana go even further, allowing impeachment of character in case of surprise, or an indispensable witness. Ind. Ann. Stat. (1 Burns 1914) § 531; Ky. Code Civ. Proc. (1895) § 596.

[17] *Conselyea* v. *VanDorn* (1908) 129 App. Div. 520, 114 N. Y. Supp. 61; *Cox* v. *Prater* (1881) 67 Ga. 588; *White* v. *Collins* (1903) 90 Minn. 165, 95 N. W. 765; *Moore* v. *Crosthwait* (1902) 135 Ala. 272, 33 So. 28; *contra,* as to necessity of laying a foundation, *Young* v. *Brady* (1892) 94 Cal. 128, 29 Pac. 489.

[18] Ohio Gen'l Code (rev. ed. 1921) tit. IV, div. III, c. 3, § 11497; S. Dak. Rev. Code (1919) tit. 2, pt. 8, c. 2, § 2714; N. Dak. Comp. Laws, Code Civ. Proc. (1913) c. 19, § 7870; Pa. Stat. (1920) § 21863; Mass. Rev. Laws (1902) c. 175, §§ 22, 24; Mich. Ann. Stat. (Hill, 2d ed. 1913) tit. XXX, c. 341, § 12865; Idaho Comp. Stat. (1919) § 8035; and N. C. Cons. Stats. (1919) art. 44, c. 12, §§ 900, 904, interpreted in *Coates* v. *Wilkes* (1885) 92 N. C. 376.

allow the adverse party so called to be examined as if under cross examination. In general language and import they are similar to this Wyoming statute, but it will be noticed that the latter goes even further than any of the others. It states that any employe of a corporation which is a party of record comes within the scope of the statute for all purposes. It also provides that the evidence of a party or witness may be rebutted by impeaching testimony. One of the usual ways of impeaching a witness upon cross-examination is by proving his general bad character for veracity.[19] This method of impeachment, coupled with the provision in this statute that the party may be examined as if under cross-examination, seems to indicate that one may call the adverse party, and then, if his testimony is unfavorable, proceed to disparage his character. Such a construction would bring this new section into apparent conflict with the next section of the act into which it is incorporated[20] which provides, as is usual, that "the party producing a witness shall not be allowed to impeach his credit by evidence of bad character." The harmonization of these two sections may become an interesting local problem. It may be possible to interpret the words "impeaching testimony" in the new section as referring only to the other methods of impeachment noted above.

This new statute and the other similar acts[21] are important in several respects. In the first place, they show the growth of the inclination to depart completely from the rule against impeaching one's own witness as applied to the calling of the adverse party. Furthermore, they indicate a realization of the need for improved methods of drawing evidence from an opponent. This is secured by the license to cross-examine. These statutes evidently disregard the policies underlying the common law rules of exclusion from which they depart. The emphasis is now placed upon the importance of getting all the relevant facts before the jury. Greater confidence is thus shown in the ability of that body to weigh testimony.

[19] 5 Jones, *op. cit.* § 844.
[20] Wyo. Comp. Stat. (1920) c. 363, § 5809.
[21] See *supra,* footnote 18.